15-2200-14172-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Administrative Penalty Order Issued to Huntington Family Limited Partnership and Hamlet Green, LLC, dated September 27, 2000

RECOMMENDED RULING ON CROSS-MOTIONS FOR SUMMARY DISPOSITION

The above-entitled matter is before Administrative Law Judge (ALJ) Beverly Jones Heydinger on the parties' cross-motions for summary disposition. Minnesota Pollution Control Agency (MPCA) filed its motion for summary disposition on May 22, 2001. On June 5, 2001, Huntington Family Limited Partnership and Hamlet Green, LLC, (Respondents) filed a response to MPCA's motion and a cross-motion for summary disposition. MPCA filed a response on June 8, 2001. The record closed on June 19, 2001, with the submission of the parties' reply memoranda.

Robert B. Roche, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota, 55101-2127, represented the Minnesota Pollution Control Agency ("MPCA"). James A. Wade, Attorney at Law, Johnson, Killen & Seiler, P.A., 230 W. Superior Street, Suite 800, Duluth, Minnesota 55802 represented Huntington Family Limited Partnership and Hamlet Green, LLC (Respondents).

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

1. That the Minnesota Pollution Control Agency's motion for summary disposition be GRANTED.
2. That Respondents' motion for summary disposition be DENIED.
3. That a prehearing conference shall be held by telephone on July 19, 2001 at 1:30 p.m. to address the reasonableness of the penalty amount.

Dated this 9th day of July, 2001.

BEVERLY JONES HEYDINGER

Administrative Law Judge

MEMORANDUM

Undisputed Underlying Facts

The Respondents appealed an Administrative Penalty Order that the MPCA issued to them on September 27, 2000. The Administrative Penalty Order cites Respondents for engaging in construction activity without first applying for and obtaining a general construction storm water permit. With respect to the activity engaged in by Respondents, there are no material facts in dispute. The parties have stipulated to the following: On November 4, 1999, Respondents, together with Michael J. Ives and James L. Holmgren ("Owners"), were the owners in fee simple absolute of 57 contiguous acres located in Duluth, Minnesota.[1] The Owners purchased the property with the intent to develop it or sell it to third parties.[2]

In 1994, the Owners negotiated with Opus Corporation for the sale of the property as a retail development site.[3] On August 29, 1994, Respondent Hamlet Green petitioned the Duluth City Council to reclassify the subject property to shopping center zoning.[4] The Duluth City Council did approve the reclassification but it was repealed by a citywide referendum in November of 1996.[5] After the repeal, the property was zoned for a Community Unit Plan, which allows property to be developed for single family housing with up to 25 percent of the acreage devoted to retail development.[6]

The proposed Opus development was ultimately abandoned, and the Owners began negotiating with Home Depot, U.S.A. ("Home Depot") to sell the property for retail development.[7] On October 26, 1999, Home Depot submitted an application to the City of Duluth for a permit to build a retail sales building on the property. The permit application was accompanied by a check from Northland Constructors, Inc., signed by Jim Holmgren.[8]

On November 4, 1999, the Owners engaged the services of William Jokela, an independent logger, to clear trees from approximately 15 acres of the property.[9] Mr. Jokela was paid a fee to remove the trees. The value of the cut timber was deducted from this fee.[10] The owners wanted the trees removed to make it clear that the property was not a public park and to discourage trespassing. In addition, the proposed development and rezoning of the property had been the subject of a lawsuit that was dismissed on or about September 13, 1999. Because the suit was no longer pending, the Owners wanted to assert dominion and control over the property. And finally, the Owners believed that limited tree removal might make the property more attractive for development.[11]

At some point in November 1999, the Owners entered into an agreement with Northland Constructors and Home Depot to enter onto the property and study the feasibility of constructing a Home Depot store and garden facility. And at some point after November 4, 1999 and before November 24, 1999, Northland Constructors stored several pieces of heavy construction equipment on the property.[12]

Although the Owners were not parties to any contract to sell or develop the subject property on the date the trees were removed, they were actively negotiating for the sale and development of the subject property.[13] When the trees were removed on November 4, 1999, the Owners had not applied for or obtained a general construction storm water permit. Nor had the Owners put sediment and erosion control measures in place on the subject property. A sediment fence was installed as requested by the MPCA on November 5, 1999.[14] An application for a general construction storm water permit was also submitted at the MPCA's request on November 5, 1999. The permit application listed Michael Grady, Project Manager, Home Depot as the property owner, and Jim Holmgren, CEO Northland Companies, Inc. as the general contractor. Home Depot paid the application fee. The permit coverage became effective on November 7, 1999.[15]

On September 27, 2000, the MPCA issued the Owners an Administrative Penalty Order for engaging in construction activity without first applying for or obtaining a general construction storm water permit. The APO required the Owners to pay a penalty of $2,500. On October 24, 2000, the Respondents requested review of the APO pursuant to Minn. Stat. § 116.072, subd. 6. The only issue on summary disposition before the Administrative Law Judge is whether clearing the trees from approximately fifteen acres of the Respondents' property constituted "construction activity" within the meaning of 40 CFR § 122.26(b)(14)(x).

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[16] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition of contested case matters.[17]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. The resolution of a material fact will affect the result or outcome of the case.[18] To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.[19] When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party,[20] and all doubts and factual inferences must be resolved against the moving party.[21] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[22] Here, the parties have agreed to the material facts necessary to resolve the cross motions.

Discussion of Parties' Contentions

The MPCA contends that Respondents engaged in construction activity as the term is defined by law without first obtaining the required general storm water permit. Both state and federal law provide that land-altering activity that disturbs five acres or more is "construction activity" subject to general storm water permitting requirements. Under 40 CFR § 122.26(b)(14)(x), "construction activity" including "clearing, grading and excavation" that disturbs more than five acres of total land area is considered "industrial activity" requiring a storm water discharge permit. State law incorporates this definition and provides that a National Pollutant Discharge Elimination System (NPDES) storm water discharge permit is required if a person is performing industrial or construction activity as defined in 40 CFR § 122.26(b)(14)(i-xi).[23] The term "general construction storm water permit" is further defined in Minnesota Rule 7001.1020, subp. 16a to mean "an NPDES general permit for storm water discharges from any construction activity including clearing, grading, and excavation activities disturbing five or more acres of land." And Minnesota Rule 7001.1020, subp. 8A defines "commencement of construction" to mean conducting "significant site preparation work, including clearing, excavation, or removal of existing buildings … necessary for the placement, assembly, or installation of facilities or equipment."

The MPCA asserts that the Respondents in this case engaged in "construction activity" by clearing trees from approximately 15 acres of land. The MPCA argues that state and federal law provide that land-clearing activity that disturbs more than five acres is "construction activity" for storm water permitting purposes. Because Respondents engaged in this activity without first obtaining the required permit, the MPCA maintains that the Administrative Law Judge should affirm the Administrative Penalty Order.

Respondents argue that they did not engage in "construction activity" requiring a storm water permit on November 4, 1999. Rather, Respondents maintain that the Owners cut the trees to assert dominion over the property and deter trespassers who were treating the property as a public park. Respondents point out that the Owners were not parties to any contract to sell or develop the property at the time the trees were cut down. Hence, Respondents assert that the tree removal was not done in preparation for construction or development, and that cutting down trees is not construction activity. Because the Owners removed the trees for reasons unrelated to "construction activity", Respondents contend that no permit is required. According to Respondents, the fact that the Owners reached agreement with Home Depot and Northland Constructors to begin a feasibility study into the potential development of their property shortly after the trees were cut was "merely a coincidence for which the Owners should not be penalized."[24]

Respondents further argue that the absence of a construction contract should be viewed as highly probative circumstantial evidence that the tree removal was not related to any construction activity and is therefore not governed by 40 CFR § 122.26(b)(14)(x). Moreover, Respondents assert that the goal of the applicable regulations, which is to minimize pollution caused by soil erosion, is not furthered by the APO issued in this case. Respondents argue that it is the removal of vegetation and topsoil, in addition to trees, that causes soil erosion. Because the Owners only

removed trees without disturbing the undergrowth, stumps or topsoil, Respondents contend that the permit requirements should not apply and the APO should be reversed.

The Administrative Law Judge is not persuaded by Respondents' arguments. The stipulated facts demonstrate that the Owners engaged in "construction activity" as defined by 40 CFR § 122.26(b)(14)(x) and Minnesota Rule 7001.1035A. Specifically, the Owners stipulated that they hired an independent logger to "*clear* trees from approximately 15 acres of the subject property."[25] Construction activity includes site preparation with clearing operations that disturb five or more acres of land and requires a storm water discharge permit.[26] Because the Owners cleared trees from 15 acres of land without first obtaining the required permit, they violated state and federal regulations and are subject to an administrative penalty. And, despite Respondents' claim that the lack of a contract to sell or develop the land is probative of whether one engages in "construction activity", the regulations do not limit "construction activity" to only that performed pursuant to a valid contract. Besides, while Respondents may not have had a contract with Home Depot on November 4, 1999, Home Depot submitted a permit application to the City of Duluth on October 26, 1999 to build a store on the subject property. And it was Home Deport that submitted and paid for the storm water permit application on November 5, 1999.[27] The ALJ finds Home Depot's involvement in the permit application process before and after the trees were cleared to be more probative of whether the trees were removed in preparation for construction or development than the lack of a signed contract with the Owners.

Moreover, the existence of a contract to sell or develop the property is not determinative of whether one engaged in "construction activity". The regulations do not require a valid contract to engage in construction activity, and the ALJ will not read such a requirement into the rules. In fact, such an interpretation would allow property owners to engage in significant site preparation on their own property without meeting permit requirements. This is inconsistent with both the plain language and the purpose of the regulations, which is to minimize sediment-laden storm water runoff from construction sites. Instead, a plain reading of the regulatory language defines the clearing of more than five acres of land to be "construction activity". Because Respondents stipulated that they cleared trees from 15 acres of the subject property, they engaged in "construction activity" as defined in 40 CFR § 122.26(b)(14)(x) requiring a NPDES storm water permit pursuant to Minnesota Rule 7001.1035.

The Respondents contend that the removal of trees did not disturb stumps, underbrush and topsoil and would not increase erosion. The MPCA asserts that the tree canopy helps prevent erosion. Although there is a lack of information about the number and density of the trees removed, and the damage that may have done to the underbrush and topsoil, there is no material dispute of fact because the parties stipulated that the trees were cleared over more than five acres. The regulations specifically require a permit for this level of activity.

The Administrative Penalty

The Commissioner of the MPCA has the authority to assess penalties of up to $10,000 for violations of the agency's regulations.[28] In determining the amount of the penalty, the Commissioner may consider the following factors:

(1) the willfulness of the violation;

(2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;

(3) the history of past violations;

(4) the number of violations;

(5) the economic benefit gained by the person by allowing or committing the violation; and

(6) other factors as justice may require, if the Commissioner or county board specifically identifies the additional factors in the commissioner's or county board's order.[29]

The MPCA staff recommended an administrative penalty in the amount of $2,500. The Administrative Law Judge may not recommend a change in the amount of the proposed penalty unless she determines, based on the factors, that the amount is unreasonable.[30] In order to impose a monetary penalty, the MPCA must establish the facts at issue by a preponderance of the evidence.[31] Hence, the MPCA must establish the existence of the asserted violations and the factors relied upon in its penalty calculation by a preponderance of the evidence. If the MPCA does so, it has a degree of discretion in the dollar amount of penalty assessed for each proven violation.

The parties have stipulated to the facts and the MPCA has demonstrated that Respondents violated state permitting regulations. The only remaining issue is whether the amount of the proposed administrative penalty is reasonable based on the factors contained in Minn. Stat. § 116.072, subd. 2. As neither party has discussed the penalty calculation, the Administrative Law Judge shall schedule a prehearing conference to determine whether a hearing on the penalty amount is needed.

B.J.H.

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[1] Stipulation of Facts at ¶ 1.
[2] Id. at ¶ 2.
[3] Id. at ¶ 3.
[4] Id. at ¶ 3.
[5] Id. at ¶ 4.
[6] Id. at ¶ 4.
[7] Id. at ¶ 6.
[8] Id. at ¶ 6.
[9] Id. at ¶ 7.
[10] Id.
[11] Id. at ¶ 8.
[12] Id. at ¶ 9.
[13] Id. at ¶ 10.
[14] Id. at ¶ 10.
[15] Id. at ¶ 11.
[16] Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1995); Louwgie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.
[17] *See* Minn. Rules 1400.6600 (1998).

[18] Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).
[19] Thiele v. Stitch, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).
[20] Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984).
[21] *See, e.g.,* Celotex, 477 U.S. at 325; Thompson v. Campbell, 845 F.Supp. 665, 672 (D.Minn. 1994); Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971).
[22] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986).
[23] Minn. R. 7001.1035.
[24] Respondents' brief at p. 5.
[25] Stipulation of Facts at ¶ 7. Emphasis added.
[26] 40 CFR § 122.26(b)(14)(x); Minnesota Rule 7001.1035.
[27] Stipulation of Facts at ¶ 11.
[28] Minn. Stat. § 116.072, subd. 2 (2000).
[29] Id.
[30] Minn. Stat. § 116.072, subd. 6(c).
[31] Minn. Rule 1400.8608.